



RQ-1097

JAMES WARREN SMITH JR.

COUNTY ATTORNEY
FRIO COUNTY

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FEB 20 1998

Opinion Committee

February 19, 1998

The Attorney General of Texas
Supreme Court Building
Attn: Opinions Committee
P.O. Box 12548
Austin, Texas 78711-2548
CERTIFIED MAIL NO. P 440 930 924

FILED ML-40096-98
I.L. 40096

Re: Request for attorney general's opinion pursuant to V.T.C.A., Government Code, Section 402.043

Dear Sir/Ma'am:

In accordance with referenced statute, I am requesting an attorney general's opinion. I will first pose the questions, state the facts, the law that I think is applicable, and my conclusion.

FACTS:

A local rancher who is a "scientific breeder" (as defined in Texas Parks and Wildlife Code ["Code"] Section 43.351[1]) holds a valid scientific breeder's permit issued by the Texas Parks and Wildlife Department ("Department") (see Section 65.602(b), Texas Parks and Wildlife Department Proclamations ["Proclamations"]).

As a result of holding the scientific breeder's permit, the rancher is subject to inspections by authorized personnel of the Department (see Section 65.606(a), Proclamation). Furthermore, if any additions are made to a facility (as this is defined in Section 65.601, Proclamation) by a permittee, then authorized personnel of the Department must inspect the addition(s) to the facility prior to the placement of deer in it (see Section 65.606[b], Proclamation).

At a meeting in Austin of the Texas Parks and Wildlife Commission ("Commission") on January 21, 1998, Mr. Jerry Cooke, Upland Wildlife Ecology Program Director, presented recommended changes to Section 65.606(b), Proclamation, *inter alia* to eliminate pre-inspection approval by authorized personnel of the Department of additions to a facility prior to the placement of deer in it. (See enclosed copy of Texas Parks and Wildlife "Commission Agenda, No. 7, Action, Scientific Breeder Proclamation, January, 1998" pg. 8 of 13 ("Agenda"). This proposed Scientific Breeder Proclamation was published in the December 19, 1997, issue of the Texas Register for public comment. Public comment was received, analyzed and staff responded to the public comment on the proposed Scientific Breeder proclamation.

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The rancher who was present at the January 21st meeting of the Commission, and he understood that the new proposed Section 65.606(b) of the Proclamation was then in effect (absent an effective date in the enclosed copy of the new proposed Proclamation). Consequently, he proceeded to place deer on February 1, 1998, into his new additions to his facility without prior approval of an authorized representative of the Department as mandated by the prior law.

The Department was aware of these new additions to this rancher's facility, since his scientific breeder's permit expired on November, 1997; and pursuant to Section 65.603(d), Proclamations, the rancher re-applied for a new annual permit, paid the fee, and supplied a plat indicating the new additions to the facility.

On February 9, 1998, the rancher was cited by a Texas Parks and Wildlife Warden pursuant to Section 65.611(b). Proclamation, for holding deer in unapproved additions to his facility.

The rancher maintains that a double standard exists since in an unrelated matter at a Parks and Wildlife Commission meeting in Austin in June, 1997, the rancher was informed by Commission staff that it wouldn't be necessary to tag or mark deer held in captivity by a permittee (see Section 65.607, Proclamations, and Section 43.35b[b], which Code's effective date was September 1, 1998, with a metal tag but that scientific breeders could use any tags (in which his case, he used and is using a plastic tag) to mark the deer, since the new proposed Scientific Breeder Proclamation would eliminate altogether the need for only a metal tag to mark the deer (see enclosed copy of Agenda, pg. 8 of 13) which this ranger and others proceeded to so mark their captive deer. Also the amended Section 43.356(b), Code, was not to take effect until September 1, 1997, but apparently this rancher and others were informed to proceed and mark the deer; and, if desired, with tags other than metal ones.

QUESTIONS:

What is the effective date of the proposed new amendments to the new Scientific Breeder Proclamation? Is there justification for selective enforcement of Section 43.356(b) of the Code and Section 65.606(b) of the Proclamation.

APPLICABLE LAW:

First, Section 43.357(b) of the Code authorizes the Commission to make regulations governing the possession of white-tailed deer for scientific, management and propagation purposes

Consequently, the Commission has promulgated in its Proclamation (among other regulations) amendments to Sections 65.603(d), 65.602(b), 65.606(a), (b), 65.607 and 65.611.

The Texas Register is published by the secretary of state in order to provide adequate and proper notice to the public of proposed state agency rules and actions. (See Section 2002.002, Government Code ["GC"]). The Texas Register, *inter alia*, must contain notices of proposed rules (see Section 2002.001(1) GC) and the text of rules adopted and filed. (See section 2002.011[2]).

The effective date of a rule generally takes is twenty days after the date on which it is filed in the office of the secretary of state (see Section 2001.036[a]). There are exceptions none of which pertain here.

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MY CONCLUSION:

Even if the rule change to Section 65.606(b) of the Proclamation was filed on January 21, 1998, twenty days did not elapse when he placed deer in the unapproved additions to his facility on February 1, 1998. Therefore, there would be a possible violation of the old Section 65.606(b) of the Proclamation.

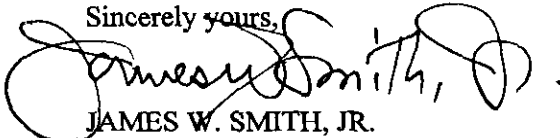
It is fundamental that ignorance of the law is no excuse but the rancher was apparently given "leeway" at the June meeting of the Commission with respect to tagging a deer held under a scientific breeder's permit by being informed that permittees didn't have to use metal tags exclusively even though the amended statute (Section 43.356[b], Code wouldn't take effect until September 1, 1997.

Therefore, equitably speaking and from a private citizen's viewpoint, one could conclude that the mens rea or criminal intent wouldn't be present for the violation of Section 65.606(b), Proclamation. A second factor would be what apparently is selective enforcement of statutes due to the rancher being informed at a June meeting of the Commission to go ahead and use non-metal tags which was a violation under the old Section 43.356(b) which was still in force at that time.

Although a citation has been issued the Texas Parks and Wildlife Game Warden, no complaint has been filed in any justice court on this matter.

Any opinion found or informal would be greatly appreciated as to this matter.

Sincerely yours,

A handwritten signature in black ink, appearing to read "James W. Smith, Jr.", with a large, stylized initial "J" and "S".

JAMES W. SMITH, JR.

JWSJr/ymm

xc: Files